

FACSIMILE COVER SHEET

02-381
01-14
03-202

DATE: April 20, 2004

ATTENTION: Wireless Telecommunication Bureau
Nancy Plon

FROM: Rural Utilities Service
Administrator Hilda Legg

SUBJECT: NPRM response

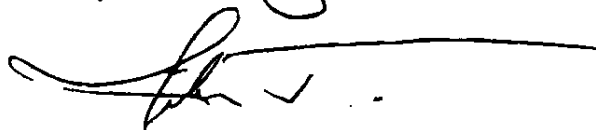
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Federal Communications Commission
Office of the Secretary

Kind regards,





United States Department of Agriculture
Rural Development

Rural Business-Cooperative Service • Rural Housing Service • Rural Utilities Service
Washington, DC 20250

April 14, 2004

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Federal Communications Commission
Office of the Secretary

Mr. John Muleta
Chief - Wireless Telecommunication Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Dear Chief Muleta:

Thank you for the opportunity to respond, on behalf of Rural Utilities Service (RUS), to the Federal Communication Commission's (FCC) Notice for Proposed Rule Making (NPRM) Docket No. 03-202.

It is my understanding that FCC staff would like RUS' feedback regarding the proposal in docket 03-202 to provide certain licensees the authority to grant RUS a security interest in their FCC licenses.

In regards to this proposal we submit the following comments:

RUS is in favor of the issuance of a final rule allowing it as a government entity to obtain a security interest in an FCC license whenever RUS approves a loan to an entity holding a license. The security interest should be granted whether or not RUS was providing funding for the license.

Allowing RUS to obtain a security interest in an FCC license will greatly improve loan security and will facilitate the agency's role in fulfilling the President's goal for the universal deployment of broadband service for the reasons outlined below.

First, in many situations, and particularly those involving start-up ventures, the licenses are the most valuable assets. In order to reasonably secure the lien, RUS would need either a lien on the licenses or some other asset. In many cases, the loan process is complicated and delayed because of the need to negotiate some other form of collateral when the borrower cannot pledge the licenses as security. This will also result, in some cases, with RUS turning down an applicant that is otherwise feasible because sufficient security cannot be obtained. This is detrimental to the President's goal for universal broadband deployment in the near future.

Second, although it is possible to obtain a security interest on the proceeds from the sale of the license, an operation is much more valuable if there is the ability to sell the operation as a whole instead of liquidating the individual assets in the event of default. By allowing the means to keep

Mr. John Muleta

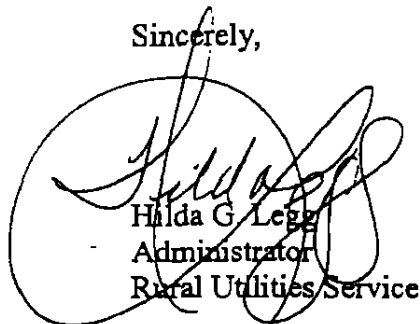
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the spectrum and the assets together, loan security is greatly improved as is the value of the system. Therefore, by allowing RUS the ability to obtain a security interest in FCC licenses, RUS' overall loan security is improved by having direct access to the licenses in the event of default, eliminating the delay for the FCC to re-auction the license and then recouping any losses by receiving a share of the proceeds that the FCC collects. The public interest is best served by keeping the spectrum and the assets together. This allows service to the public to remain uninterrupted during any foreclosure or bankruptcy proceedings and subsequent restructuring arrangement. Again, if the licenses are separated from the assets and the assets are then liquidated, then service to the public ceases to exist.

Please see the enclosed Appendix to the above comments for further specifics pertaining to our response on this matter.

I appreciate the forum to present our candid response on the issue of security positions and FCC licenses. It is with appreciation for all that the FCC Wireless Bureau does for rural America broadband deployment that I say thank you for your support of this shared mission.

Sincerely,



Hilda G. Legg
Administrator
Rural Utilities Service

Enclosure

APPENDIX TO RUS' COMMENTS

Present Prohibition of Security Interests

There is no clear legal prohibition in the Communications Act of 1934 (47 U.S.C. § 151 *et seq.*) from taking a security interest in spectrum licenses issued by the FCC, only the FCC's current rules or policies on such a prohibition. In regard to radio broadcasting licenses, courts have noted that the "FCC has not yet gone so far as to abandon its policy precluding creditors from holding security interests in broadcasting licenses." See *State Street Bank and Trust Co. v. Arrow Communications, Inc.*, 833 F. Supp. 41 (D. Mass. 1993) (citing the FCC's INVESTMENT IN THE BROADCAST INDUSTRY, 57 Fed. Reg. 14684, 14685 (1992)). The court also noted that "the Commission historically has taken the view that its rule prohibiting sellers from retaining a reversionary interest and its policy prohibiting third party security interests were based upon statutory provisions prohibiting the grant of ownership interests in the spectrum and the assignment by licensees of their interests in a license without prior Commission approval," and added that "[w]hether to permit such interests is, as the parties agree, a matter for the FCC rather than the courts to decide." See *Id.*

Arguments in Favor of Permitting RUS a Security Interest

There appears, then, to be no legal impediment to RUS' taking a security interest in the licenses issued by the FCC. Significant case law has already been pointing in that direction.

A. Lien in Proceeds Already Permitted.

The courts have already held that although the licensee may not issue a security interest in the license, it may grant a security interest in the proceeds of the sale of the license. See *State Street; In re Thomas Communications, Inc.*, 166 B.R. 846 (S.S.W. Va. 1994). One court noted that a creditor may perfect security interest in a debtor's FCC broadcasting license, limited to the extent of the licensee's proprietary rights in the license, which rights included a claim to proceeds received by the licensee from the sale of the license. However, the court noted that a creditor could not foreclose on the license, as such rights were rights of the FCC. See *In re Ridgely Communications, Inc.*, 139 B.R. 374 (Bkrcty. D. Md. 1992).

B Licensee Already Has Right to Sell or Transfer

Additionally, courts have already begun treating the license as "property," as opposed to past practice, in the sense that they can now sell the license for profit. The court in *In re Tak* noted that the Communications Act did "not bar the for-profit sale to a private party, subject to prior Commission approval, of whatever private rights a permittee has in its license". See *In re Tak Communications, Inc.*, 138 B.R. 568, 571 (W.D.Wis.1992). One court has noted that "[a] broadcast license is a thing of value to the person to whom it is issued and a business conducted under it may be the subject of injury.". See *L.B. Wilson, Inc. v. FCC*, 170 F.2d 793, 798

(D.C.Cir.1948). But the courts have still refrained from permitting the grant of security interests, despite this property right. See *In re Tak* (noting that the *Welch* court's "expansion of licensees' rights in the particular area of selling bare authorizations for unbuilt cellular service facilities does not suggest that licensees can treat the licenses as property for all purposes, including the granting of security interests.")

C. FCC Already Has Security Interest.

RUS points out that the FCC already takes a security interest in the license. On appeal, the *Nextwave* court noted that the licensee made a down payment on the purchase price, signed promissory notes for the balance, and executed agreements giving the FCC a first lien on, and security interest in, licensee's rights and interest in the licenses through a UCC financing statement, and that failure to comply with this condition would result in their automatic cancellation. See *FCC v. Nextwave Personal Communications, Inc.* 537 S. Ct. 293, 296-97 (2003). Under the theory of subrogation of federal rights, the FCC then, as a federal agency, should have the ability to transfer its interest in the license to another federal agency, especially one that has expended federal money in the purchase of the license. Moreover, the end result would be that the federal government, as a whole, would reap the benefit of the highest value of the license by keeping the license and the company together as a going-concern.

D. Right to Sell as Going Concern

But most important, as stated above, the right to take a security interest would also protect the government's investment by being able to take advantage of the Borrower's value as a going concern. The *Thomas* court already noted that licensees have already raised the issue of being able to sell their company as a going concern with the license, see *In re Thomas*, for prior to the 1990s this was not a clear right. *In re Bill Welch*, 3 F.C.C.R. 6502, 6503 (1988) helped pave the way by holding that "the Communications Act of 1934 did not bar the for-profit sale to a private party, subject to prior Commission approval, of whatever private rights a permittee has in its license." In regard to the present issue, without the right to secure an interest in the license granted by the FCC, RUS may have to reject applications for financial assistance that were on the cusp, given that the going-concern value of the borrower's company would have to be lowered in its financial analysis.